18-56457

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA; and EDMUND G. BROWN, JR., as Governor of the State of California; DOES 1 THROUGH 10,

Defendants and Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 16-01713
The Honorable Cynthia Bashant, United States
District Judge

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INTRODUCTION

This appeal involves tribal-state class III gaming compact negotiations pursuant to the federal Indian Gaming Regulatory Act of 1988, 18 U.S.C. §§ 1166-1168 and 25 U.S.C. § 2701 et seq. (IGRA). The negotiating parties are the appellees the State of California, and Gavin Newson,[1] as Governor of the State of California (collectively, State) and appellant Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a/k/a Pauma Band of Mission Indians, a federally-recognized Indian tribe (Pauma or Tribe). Pauma currently operates a casino under a compact negotiated with the State in 1999. At the end of 2014 and the beginning of 2015, Pauma and the State agreed to negotiate the terms of the Tribe's 1999 compact. In particular, Pauma was interested in expanding its rights under a new compact to operate new lottery games and an on-track horse racing facility.[2]

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Governor Newsom has been automatically substituted as a party in place of former Governor Brown. All the negotiations at issue in this appeal occurred between the State and Pauma during the Brown administration.

[2] A tribal off-track satellite wagering facility allows patrons at a tribal casino to wager on horse races that take place at licensed horse racing tracks located off the tribe's Indian lands. In contrast, an on-track horse racing facility would authorize horse racing and betting on that horse racing on the tribe's Indian lands. Both activities require a compact.

Pauma broke off the ongoing compact negotiations with the State when the Tribe filed a civil complaint in July 2016. In Counts 1 through 20 of its Second Amended Complaint, Pauma alleged that during compact negotiations the State failed to negotiate with the Tribe in good faith under IGRA. The parties filed cross-motions for summary judgment, and the district court found in the State's favor for all twenty counts.

This Court should uphold the district court's grant of summary judgment to the State. In a detailed and lengthy review of the entire Joint Record of Negotiations (Record)[3] between the parties, the district court held that the State did not negotiate in bad faith in violation of IGRA. The Record showed that on multiple occasions, the State requested and encouraged Pauma to provide compact proposals regarding the Tribe's form of gaming requests. The State's efforts at moving compact discussions

[3] Citations to "ER___" refer to pages in the Excerpts of Record filed with the Opening Brief by Appellant Pauma Band of Mission Indians (Opening Brief). The Record before the district court consisted of four volumes, and Pauma's Excerpts of Record contains volumes one, three and four. However, volume two in Pauma's Excerpts of Record omits certain pages from the transcript that recorded a negotiation session between the parties on September 8, 2015. The district court joint record pages omitted by Pauma are 43 through 78, 82 through 88, 94 through 111, 116 through 119, and 128 through 166. To provide this Court with the entire Record, the State submits the complete September 8, 2015 transcript in a Supplemental Excerpts of Record. Citations to "SER___" refer to these pages.

forward included asking for specific compact language regarding lottery games, providing Pauma with a sample on-track horse racing compact, giving the Tribe a sample off-track satellite-wagering facility compact, and proposing a draft compact to encourage discussions. Rather than respond to the State's draft compact proposal, the Tribe walked away from the ongoing negotiations.

Based on this Record, the district court properly granted summary judgment in the State's favor, and this judgment should now be affirmed on appeal.

JURISDICTIONAL STATEMENT

This action arises under a tribal-state class III gaming compact entered into between Pauma and the State. The district court had jurisdiction pursuant to 28 U.S.C. § 1362 because the action was initiated by a federally recognized Indian tribe and the matter in controversy is the construction of IGRA – the federal statute authorizing the compacting process.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the Tribe seeks review of a final decision granting summary judgment to the State and denying the Tribe's cross-motion for summary judgment. The

decision disposed of the twenty IGRA counts raised by the Tribe's SAC.[4] ER 2-58.

The appeal is timely because Pauma filed a notice of appeal on October 26, 2018, within thirty days of entry of the final judgment on September 28, 2018. ER 65-66.

ISSUE PRESENTED

1. Did the district court commit reversible error in holding that the Record between the State and Pauma showed that the State did not negotiate in bad faith under IGRA?

STATUTORY AUTHORITY

The complete text of the statutory provision at issue, 25 U.S.C. § 2710, is reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. THE HISTORY OF TRIBAL GAMING IN CALIFORNIA AND IGRA

In *California v. Cabazon Band of Mission Indians,* the United States Supreme Court held that California lacked the authority to enforce its civil-

[4] The district court's order and judgment did not dispose of two non-IGRA claims in Pauma's SAC. In contrast to the first twenty IGRA counts, Count 21 alleged a breach of compact claim regarding the State's alleged misuse of monies from a fund known as the "Special Distribution Fund." Count 22 alleged a similar claim under the implied covenant of good faith and fair dealing. Pauma subsequently dismissed both of these counts.

regulatory laws against gambling on Indian reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (*Cabazon*). As a result, gambling on Indian lands was subject only to federal regulation or state criminal prohibitions. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1091-92 (E.D. Cal. 2002).

To address concerns about unregulated gambling on Indian lands, Congress passed IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Artichoke Joe's v. Norton,* 216 F.2d at 1092. IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Id.*

Under IGRA, a tribe may conduct class III gaming once a tribal-state compact is in effect. 25 U.S.C. § 2710(d)(1). The compact requirement accords the states "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096-97 (9th Cir. 2003) (*Coyote Valley II*). Class III gaming "includes the types of high-stakes games usually associated with Nevada-

style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id.*

IGRA makes class III gaming lawful on tribal lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary of the United States Department of the Interior (Secretary). 25 U.S.C. § 2710(d)(1) & (d)(3)(B).

An Indian tribe is not authorized to operate class III gaming on its lands absent a compact with the state, 25 U.S.C. § 2710(d)(3)(B), or the implementation of "procedures" by the Secretary following a judicial finding of bad faith negotiating by the state and other remedial prerequisites. *Coyote Valley II*, 331 F.3d at 1097-98 (explaining that lawful class III tribal gaming is gaming conducted in conformance with a compact or conditions prescribed by the Secretary); *see* 25 U.S.C. § 2710(d)(7)(B)(i)-(vii).

In 1999, Governor Gray Davis commenced compact negotiations with a group of California Indian tribes. *Coyote Valley II*, 331 F.3d at 1102. A

judicial ruling by the California Supreme Court released while those negotiations were underway invalidated the Proposition 5 statutory initiative, passed in 1998, that purported to require the Governor to execute a model tribal-state gaming compact, on the ground that the initiative violated article IV, section 19(e) of the California Constitution. *Hotel Emp. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999); *Coyote Valley*, 331 F.3d at 1101, 1103. In response, Governor Davis "proposed an amendment to Section 19 of Article IV of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California." *Coyote Valley II*, 331 F.3d at 1103.

During the course of the negotiations, which took place throughout approximately April through September, 1999, Governor Davis offered the participating tribes the "major concession" of the right "to operate real Las Vegas-style slot machines as well as house-banked blackjack" plus the exclusive right to conduct those forms of class III gaming in the state, in exchange for revenue-sharing provisions directed to specified funds. *Id.* at 1104-06, (citing K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1043-44 (2002)).

Pauma, a federally recognized Indian tribe, entered into the 1999 Compact that went into effect in May 2000 (ER 094), after the passage of Proposition 1A authorized California's governor to negotiate and conclude compacts pursuant to the state constitution (Cal. Const. art. IV, § 19(f)) and upon Legislative ratification and approval of the compacts by the Assistant Secretary of the Bureau of Indian Affairs (Assistant Secretary).

In June, 2004, the State and Pauma entered into an amendment to the 1999 Compact (2004 Amendment) that became the subject of extensive litigation between the parties. The Ninth Circuit rescinded the 2004 Amendment in *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* 813 F.3d 1155, 1173 (9th Cir. 2015). As a result, the State and Pauma continue to operate under the 1999 Compact.

II. COMPACT NEGOTIATIONS BETWEEN PAUMA AND THE STATE

A. Pauma's Renegotiation Request for On-Track Horse Racing and Lottery Games, the State's Response, and the Initial Meeting on January 16, 2015

In 2014, Pauma was operating a gaming facility under its 1999 Compact with the State. ER 94. In a letter by Randall Majel, Chairman of Pauma, dated November 24, 2014, the Tribe requested the State to renegotiate the 1999 Compact pursuant to section 12.2 of both agreements. *Id*. at 94-95. This provision provides for renegotiation if the Tribe "wishes

to engage in forms of Class III gaming other than those games authorized herein . . . ." *Id*. at 95. Pursuant to section 12.2, Chairman Majel's letter described two new forms of class III gaming that the Tribe wanted to offer. *Id*. The first was "on-track betting at an on-reservation horse track that it plans to construct following the renegotiation of the agreement(s)." *Id*. Second, Pauma wanted "to supplement the lottery games it offers by obtaining the right to conduct any games that are *not* currently authorized under State law to the California State Lottery." *Id.*

In a letter dated December 15, 2014, Joginder Dhillon, Senior Advisor for Tribal Negotiations (Mr. Dhillon), responded to Chairman Majel's request for negotiations. ER 99-100. This letter advised that the State was willing to enter into negotiations regarding both forms of gaming identified in Chairman Majel's letter. *Id*. at 99. However, Mr. Dhillon also advised that to the extent Pauma was requesting negotiations for games that were not authorized in California, then such games would not be "appropriate subjects for inclusion in a Compact." *Id.* In subsequent letters, the parties confirmed an initial meeting date of January 16, 2015. ER 102-03, ER 105-06, and ER 112-13

Following the parties' initial meeting on January 16, 2015, Cheryl Williams, an attorney representing Pauma, sent Mr. Dhillon a letter dated

January 20, 2015. ER 115-117. This letter confirmed that Pauma was interested in operating an on-track horse racing facility, and not an off-track satellite wagering facility. *Id*. at 115-116. The letter also confirmed that, despite being pressed by the State for further details on this proposal, the Tribe deferred because it was "too early in the process . . . ." *Id*. at 116. This letter also described from the Tribe's perspective the discussion between the parties regarding the Tribe's request to negotiate for lottery games. *Id*. Both Pauma and the State requested the other side to provide legal authority supporting their respective positions on the Tribe's request to operate lottery games. *Id.* This letter confirmed that the parties mutually agreed to conduct their next meeting in May 2015. *Id.*

In a letter to Pauma dated January 30, 2015, Mr. Dhillon provided the State's perspective of the January 16, 2015 meeting. ER 119-21. In pertinent part, Mr. Dhillon's letter summarized that the State had entered into several off-track satellite-wagering compacts with other tribes, and that these compacts "might be used as a starting point for Pauma's proposed facility." *Id*. at 120. The State had not previously negotiated an on-track horse racing facility with any tribe. *Id*. Mr. Dhillon suggested that the parties should "reach out to the California Horse Racing Board for guidance in providing a legal framework" for further discussions on this compact

issue. *Id*. With regard to lottery games, during the meeting the "State asked for examples of the types of lottery games Pauma is considering." *Id.* Pauma referred to "'electronic games' and 'punchboards' as possibilities." *Id.* Mr. Dhillon "reiterated the State's need to understand the scope of games that Pauma intends to offer to help identify issues and establish a legal framework for future negotiations." *Id*. at 121. Finally, regarding continued compact negotiations, Mr. Dhillon noted the Tribe's confirmation that it wanted "to focus on the additional games and nothing broader." *Id.*

In May, 2015, Chairman Majel and Mr. Dhillon exchanged further correspondence regarding the January 16, 2015 meeting. In a letter dated May 8, 2015, Chairman Majel addressed the Tribe's concerns about differences in the parties' previous summary letters. ER 123-125. From the Tribe's perspective, the "chief discrepancy" was on "'how and when' the State plans to convey whether or not it even has a duty to negotiate for the lottery games . . . ." *Id.* at 123. Chairman Majel advised that the Tribe was empowered under the California Constitution to offer "*all* types of lottery games, including those not authorized to the State Lottery." *Id.* In regard to on-track horse racing, Chairman Majel stated the Tribe's desire for the State to meet "with the State Horse Racing Board to formulate the State's position regarding the civil regulations it would like to negotiate for" at future

compact meetings. *Id.* at 125. Chairman Majel's letter concluded by proposing that the next meeting take place in "two-plus months." *Id.* Chairman Majel noted that the reason for this delay was the litigation schedule between Pauma and the State in another case. *Id.*

In a letter dated May 27, 2015, Mr. Dhillon responded to Chairman Majel's May 8, 2015 letter. ER 127. In this letter Mr. Dhillon reiterated the State's previous summary of the January 16, 2015 meeting. *Id.* Further, Mr. Dhillon again stated the State's position that Pauma was not "providing a clear description of the kinds of horse racing or lottery games it sought to conduct." *Id.* Nonetheless, Mr. Dhillon agreed to hold the next compact meeting in August 2015. *Id.*

B. The September 8, 2015 Compact Meeting

In August 2015, the parties exchanged letters regarding the upcoming compact meeting. In a letter dated August 5, 2015, Ms. Williams stated Pauma's desire "that the forthcoming meeting should focus on terms" regarding on-track betting and lottery games. ER 129. In response, in a letter dated August 13, 2015, Mr. Dhillon proposed several September dates for the next meeting, and advised that the State would be prepared "to

discuss the general legal framework for lottery games and on-track horse racing as may be authorized under" federal and state law. ER 133.

This compact negotiation meeting took place on September 8, 2015. SER 4-173. Representing the State were Mr. Dhillon and attorneys Sara Drake, Jennifer Henderson, and Michelle Laird from the California Attorney General's Office. *Id.* at 5. Representing Pauma were attorneys Kevin Cochrane and Ms. Williams. *Id.* at 6. Also in attendance was Pauma's Chairman, Temet Aguilar, and Rick Baedeker of the California Horse Racing Board. *Id.* The meeting was transcribed by a court reporter. *Id.* at 4-173.

During the meeting the State attempted to learn more information about Pauma's claimed desire to operate lottery games and on-track horse racing. Mr. Dhillon asked Pauma's attorneys to "draft compact language on those two issues that you feel need to be addressed in the compact." SER 8:12-14. If Pauma provided this draft language, then "we will look at that and we will respond." *Id.* at 8:20-22. This approach would allow the parties to work on language that "hopefully will lead to a compact." *Id.* at 8:24-9:1.

On several occasions during this September 8th meeting, Mr. Dhillon repeated his request for Pauma to commit to providing compact language on both lottery games and on-track horse racing. Mr. Dhillon made clear that

he was asking for the Tribe's representatives to "do your best and we will come back with something." SER 10:9-10. Mr. Dhillon stated that this process would be "probably the best way to actually get us focused on what hopefully will result in a compact for Pauma." *Id.* at 10:16-18. He assured that the State's representatives were "certainly going to work with you." *Id.* at 14:10-11. Mr. Dhillon further emphasized his desire for the parties to "get into a more traditional sort of compact negotiation where both sides are trying to draft and having discussions to bridge issues . . . ." *Id.* at 20:18-21.

During the September 8, 2015 negotiation meeting, Mr. Baedeker from the California Horse Racing Board was available, and he answered numerous questions from Pauma's representatives regarding the horse racing industry. These topics covered the California Horse Racing Board's lack of experience in negotiating on-track compacts with tribes (SER 11:1-8), the California Horse Racing Board's interest in this concept (*id.* at 11:9-25), possible challenges for a new track in scheduling racing weeks (*id.* at 25:3-26:13), issues that could impact how well a new track would be received by the existing horse racing industry (*id.* at 31:2-32:12), licensing fees (*id.* at 33:5-35:23), and his own experience in both the business and regulatory side of horse racing (*id.* at 70:14-20). During these discussions Mr. Dhillon emphasized that it was the State's idea to bring Mr. Baedeker to this

meeting, and that the State remained willing to hold meetings with experts. *Id.* at 40:8-42:6. In particular, Mr. Dhillon stated that it would be helpful to receive Pauma's horse racing business plan. *Id.* at 62:9-17.

In regard to lottery games, at the September 8, 2015 meeting the parties discussed the concept of Pauma's proposal to operate video lottery terminals as lottery games. SER 48:9-55:7. The parties disagreed whether Pauma had previously established the type of lottery games it intended to offer under a new compact. *Id.* at 58:7-15. Mr. Dhillon asked Pauma's attorneys to get him proposed lottery game language. *Id.* at 78:24-79:5. Mr. Dhillon pressed Pauma's attorneys about when they would provide this draft compact language. *Id.* at 105:4-25. When Mr. Dhillon continued to press for an answer, Mr. Cochrane responded in part by saying "I don't know." *Id.* at 106:1-4. After further discussions, Mr. Cochrane stated that Pauma "can get a draft out quick." *Id.* at 109:21-25. Mr. Dhillon responded by asking them to "do whatever you think is best for [the] Tribe and then get that to us and we will go from there." *Id.* at 110:14-16.

C. Pauma's Request for a Dispute Resolution Meeting

Following the September 8, 2015 compact negotiating meeting, Chairman Aguilar sent a letter to Mr. Dhillon dated October 6, 2015. ER

181-88. This letter objected to Mr. Dhillon's request for Pauma to create a first-draft on-track horse racing compact. *Id.* at 181-82. This letter also stated a request to negotiate terms beyond lottery games and on-track horse racing. *Id.* at 175. Chairman Aguilar claimed that the Tribe's renegotiation request was never limited to those two issues. *Id.*

In a letter dated November 4, 2015, Mr. Dhillon responded to Chairman Aguilar's October 6, 2015 letter. ER 190-92. Mr. Dhillon's letter detailed how Pauma's initial request to renegotiate its compact under section 12.2 of the 1999 Compact was limited to expanding the scope of authorized gaming to include lottery games and on-track horse racing, and the State declined Pauma's request to expand negotiations beyond those two matters. *Id.* at 190-91.

While Mr. Dhillon's November 4, 2015 letter declined to expand the scope of renegotiations, he nonetheless reiterated the State's continued willingness to negotiate over lottery games and on-track horse racing. ER 191. Regarding on-track horse racing, Mr. Dhillon's letter enclosed a pari-mutuel horse racing compact between the Sisseton-Wahpeton Sioux Tribe and the State of North Dakota. *Id.* at 193-213. The letter advised Pauma that this out-of-state compact had been approved by the United States Department of the Interior, and "can serve as a reference to inform our

further discussions" regarding on-track horse racing. *Id.* at 191. Mr. Dhillon further advised that "[w]ith regard to lottery games, I look forward to considering Pauma's proposed compact language so we can identify and work to resolve any potential issues." *Id.* The letter concluded by saying that the State "look[s] forward to reviewing Pauma's proposals regarding a framework for final compact language addressing the new forms of gaming that it proposes to offer—horse racing and lottery games." *Id.* at 192.

In a letter dated November 25, 2015, Chairman Aguilar responded to Mr. Dhillon's November 4, 2015 letter. ER 215-216. In this letter Pauma triggered "the dispute resolution process of Section 9.1 effective as of the date of this letter." *Id.* at 215. Chairman Aguilar advised that the compact dispute related "to the proper interpretation of Sections 12.2 and 12.3 of the compact," as well as negotiation positions taken by the State. *Id.* Chairman Aguilar's letter, which was emailed to Mr. Dhillon on Wednesday at 8:45 p.m. before the four-day Thanksgiving holiday (ER 238), demanded a response within five days if the State required more information. *Id.*

In a letter dated November 30, 2015, Mr. Dhillon responded to Chairman Aguilar's November 25, 2015 letter. ER 218-19. While Mr. Dhillon agreed to meet on December 4, 2015 for a meet and confer meeting under section 9.1 of the compact, he advised Chairman Aguilar that the

Chairman's letter did not meet the section 9 .1 specificity requirement. *Id.* at 218. Mr. Dhillon's letter also noted the State's ongoing efforts to move on-track wagering discussions forward. *Id.* The State had already (1) contacted the federal Bureau of Indian Affairs' Office of Indian Gaming and found out that "[on-track horse racing] is rare even at the national level," (2) located and provided Pauma with "a compact regarding on-track betting that was previously approved by the Secretary of the Department of the Interior," and (3) brought into the last negotiation session the executive director of the California Horse Racing Board "to help inform our discussions" regarding horse racing. *Id.*

Further, Mr. Dhillon's November 30, 2015 letter referred to the need for Pauma "to describe with clarity and specificity its objectives." ER 218. While Pauma stated that it had a business plan regarding its proposed on-track horse racing, the Tribe "failed to disclose even a generalized description of that plan." *Id.* at 218-19. Furthermore, Mr. Dhillon's letter also included for Pauma's consideration an off-track "draft compact addendum that would authorize a satellite wagering facility." *Id.* at 219, 220-31.

Finally, Mr. Dhillon's November 30, 2015 letter reiterated that in "regard to the lottery games, we have asked for draft compact language and

received nothing but lengthy letters from you or your lawyers that seek to blame the State for the lack of progress . . . ." ER 219. These letters "fail to do anything to help the parties move forward towards the conclusion of a compact." *Id.* Mr. Dhillon concluded by stating that if Pauma had the goal of negotiating a compact, the Tribe would "find us a willing partner." *Id.*

Working under Pauma's demand to meet shortly after the Thanksgiving holiday weekend, through an exchange of emails the parties arranged a meeting time, location and date of December 4, 2015. ER 233-38. During these email exchanges, Mr. Dhillon reminded Ms. Williams that "Despite your many letters and e-mails, the State has yet to receive a single word of proposed compact language from the Tribe." *Id.* at 234.

D. The Dispute Resolution Meeting on December 4, 2015, and Confirmation Regarding the Scope of Continuing Negotiations

On December 4, 2015, the parties met regarding their dispute over "the meaning of compact section 12.2 and the scope of the negotiations agreed to by the parties." ER 247. This meeting was described in a letter from Mr. Dhillon to Chairman Aguilar dated December 9, 2015. *Id.* at 247-48. The State maintained its previous interpretation of compact section 12.2. *Id.* at 247. However, in an effort to move negotiations forward, Mr. Dhillon advised that the State was willing "pursuant to Section 12.1 of the compact,

to enter into negotiations for a new or amended tribal-state gaming compact." *Id.* As a result, "both parties are amenable to considering all aspects of the existing compact and other appropriate provisions to ensure that we are able to achieve our mutual objectives." *Id.*

Mr. Dhillon's December 9, 2015 letter also advised that even though the State was "currently committed to engaging in compact negotiations with a large number of tribes" it still maintained a "commitment and determination to work through the negotiation process" to successfully renegotiate a compact. ER 248. Mr. Dhillon suggested the importance of setting "realistic timeframes" while pursuing this objective. *Id.* Finally, Mr. Dhillon stated his willingness to meet either in Sacramento or at another location more convenient for Pauma, and also to conduct telephonic meetings to avoid unnecessary costs. *Id.*

In a letter dated December 14, 2015, Chairman Aguilar responded to Mr. Dhillon's December 9, 2015 letter. ER 250-51. Chairman Aguilar asked whether negotiations under compact section 12.1 would include "horse racing/on-track betting and lottery games that are not currently authorized to the State Lottery—and off-track betting, the basic terms of which the State began discussing in a draft compact that accompanied its November 30, 2015 letter." *Id.* at 250. Mr. Dhillon responded in a letter

dated January 4, 2016. *Id.* at 253. In his letter Mr. Dhillon confirmed that these negotiations would include "horse racing, off-track betting and lottery games, to the extent authorized by the California Constitution . . . ." *Id.*

E. Pauma's Proposed Lottery Game "Fix," and the State's Response

In a letter dated January 27, 2016, Ms. Williams responded to Mr. Dhillon's January 4, 2016 letter. ER 255-57. This letter stated that during the September 8, 2015 meeting, the parties discussed a "relatively minor fix that would satisfy Pauma's request with respect to this topic by expanding the scope of lottery games . . . ." *Id.* at 255. Pauma stated that there is a "gap" between the lottery language in the 1999 Compact and the lottery rights that are lawful under California law but not yet authorized to the California State Lottery. *Id.* at 240. According to Ms. Williams, this gap could be cured with two compact revisions. *Id.*

First, Ms. Williams stated that the parties would need to "insert a definition for the term 'Lottery' and/or 'Lotteries' in Section 2 of the 1999 Compact that mirrors the one set forth within Section 319 of the [California] Penal Code:

> A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such

> property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

ER 256.

Ms. Williams' January 27th letter further stated that following the above language, "[t]he next sentence can then explain that the foregoing definition is identical to the one in Section 319 of the [California] Penal Code, with the terms not only sharing definitions but meanings as well." ER 256. The second revision would then "amend the scope of lottery games authorized in Section 4.1(c) of the compact." *Id.* That section authorizes "[t]he operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through the use of the Internet unless others in the state are permitted to do so under state or federal law." *Id.* Ms. Williams' letter proposed that the parties remove the "that are authorized under state law to the California State Lottery" language and replace it with "that are defined under this compact as a Lottery." *Id.*

Ms. Williams' January 27, 2016 letter further advised that the next sentence in the proposed compact could then explain that, under this compact provision, Pauma's authorized compact gaming:

> shall include, but not be limited to, (1) devices or games that are authorized under State law to the California State Lottery, (2) devices or games that are authorized to the Multi-State Lottery Association, (3) devices or games that are authorized to any other state lottery or any other multi-state lottery association, (4) punchboards, (5) lottery games that use the themes of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing, (6) lottery games that are played on video terminals, (7) video lottery games that dispense coins or currency, (8) lottery games that incorporate technologies or mediums that did not exist, were not widely available, or were not commercially feasible in 1984 (save for the restriction on the use of the Internet, *supra*), and (9) any other games or devices that fall within the definition of Lottery.
>
> ER 256-257.

According to Pauma, this approach would provide the Tribe with its desired "full lottery rights" under a compact. ER 257.

On March 30, 2016, Mr. Dhillon responded by letter to Ms. William's letters of January 27 and March 7, 2016. ER 262-63. With regard to Pauma's lottery game proposal, Mr. Dhillon advised that the Governor's authority under the California Constitution to negotiate lottery games with tribes "has always been understood to encompass those games authorized for play by the California State Lottery." *Id.* at 262. Nonetheless, the State was

"willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact." *Id.* But Mr. Dhillon's letter made clear the need to specifically describe any agreed-to lottery game to (1) provide "clarity as to the scope of the authorization," (2) avoid "future disputes between the parties" regarding the scope of approved games, and (3) reduce "the risk of running afoul of other prohibitions on how lottery games may be conducted, such as the keno game offered by the California State Lottery that was found to be an illegal banked game by the Supreme Court in *Western Telcon, Inc. v. California State Lottery* (1996) 13 Cal.4th 475." *Id.*

While Mr. Dhillon's March 30, 2016 letter stated an intent to further negotiate over some lottery games that were not prohibited under California law, his letter specifically did not concede that the State was under "an obligation to negotiate for all lottery games enumerated in your January 27, 2016 letter (other than those authorized to the California State Lottery)." ER 262. In particular, Mr. Dhillon's letter advised that "the State expressly takes issue with Pauma's ability under IGRA to seek to negotiate 'devices or games that are authorized to any other state lottery or other multi-state lottery association,' 'lottery games that are played on video terminals,' 'tribal lottery systems' or other lottery systems to the extent operated or

conducted off tribal lands, and 'video lottery games that dispense coins or currency.'" *Id.* at 262-63.

Finally, with Pauma still not having provided the State with a draft compact, Mr. Dhillon's March 30, 2016 letter confirmed that "[t]he State will provide Pauma a complete draft document to guide our future discussions within the next few weeks." ER 263. While Mr. Dhillon observed that the State was currently in compact negotiations with "over forty other California tribes" and that the State remained in litigation with Pauma in another federal court case, the State nonetheless was "committed to moving these negotiations forward but also understand[s] if the Tribe prefers, as it has previously, to defer some negotiation matters until there is a break in the litigation." *Id.*

F. The State's Proposed Draft Compact for Pauma's Consideration

On April 28, 2016, Ms. Drake sent Pauma's attorneys, via e-mail, "the State's draft compact for [Pauma's] consideration." ER 267. The bottom of the compact's first page is labeled "State's Draft Compact 4/28/2016." *Id.* at 268. Ms. Drake's email further requested Pauma's attorneys to "[p]lease let us know when you would like to discuss." *Id.* at 267.

The State's proposed draft compact covered several key issues. ER 268-403. These included sections on the proposed draft compact's purposes and objectives (*id.* at 276-77), the scope of authorized class III gaming (*id.* at 282), the authorized location for Pauma's gaming facility, the number of gaming devices, cost reimbursement and mitigation (*id.* at 282-89), revenue sharing with non-gaming and limited gaming tribes (*id.* at 290-95), gaming operation and facility rules and regulations (*id.* at 330-42), off-reservation environmental and economic impacts (*id.* at 343-50), public and workplace health, safety, and liability obligations (*id.* at 350-66), dispute resolution provisions (*id.* at 366-69), and various miscellaneous provisions (*id.* at 372-374).

While the draft compact provided by Ms. Drake to Pauma on April 28, 2016 was comprehensive, it remained a work in progress. ER 268-403. The proposed draft compact indicated several areas were the State anticipated further input from Pauma. For example, with regard to lottery games, the draft compact included a margin comment advising that the "State is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated games." ER 282. Further in regard to off-track horse racing, another margin comment in the proposed draft compact stated that the "State has proposed OTW [off-track wagering]

compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact". *Id.*

III. PAUMA COMMENCES CIVIL LITIGATION UNDER IGRA

Pauma did not respond to Ms. Drake's April 28, 2016 communication or engage in further negotiations regarding any topics addressed by the State's initial draft compact and, within a few months, filed its IGRA complaint. ER 026.

SUMMARY OF THE ARGUMENT

The Record strongly supported the district court's decision to grant summary judgment in the State's favor on all twenty IGRA counts. Regarding Pauma's draft compact counts (Counts 11 through 20) summary judgment was proper because the State provided Pauma with individualized negotiations. While these compact negotiations were ongoing, the State delivered a comprehensive compact proposal to Pauma on April 28, 2016. If Pauma was dissatisfied with various proposals in the draft compact, it should have offered a counter-proposal. Instead, the Tribe sued the State for bad faith under IGRA. The Tribe's decision to choose litigation over negotiation regarding the State's April 28, 2016 draft compact did not show bad faith negotiating by the State. For that reason, the district court correctly found in the State's favor on Pauma's draft compact counts.

The Record also supported the district court's summary judgment in the State's favor on Pauma's lottery counts (Counts 1, 2, 4 through 8, and 9). The State did not engage in surface bargaining over lottery games. Instead, the Record showed that the State urged Pauma to propose compact language for specific lottery games. Further, the State was not attempting to protect the California State Lottery from tribal competition, and even offered to negotiate with Pauma over additional games that are not authorized to the California State Lottery. Rather than propose such games that could have been enumerated in a compact, the Tribe abandoned further negotiations. Once again, this decision by the Tribe does not show that the State violated its obligation to negotiate in good faith under IGRA.

Moreover, the Record supported the district court's summary judgment in the State's favor regarding the scope of negotiations (Count 10). Specifically, the State did not violate IGRA when it agreed to the Tribe's request to renegotiate the entire class III gaming compact. Having resolved this dispute over the scope of compact talks, the State did not negotiate in bad faith in violation of IGRA when it subsequently rejected Pauma's request for piecemeal negotiations.

Finally, the State did not negotiate in bad faith regarding Pauma's horse racing count (Count 3). Regarding this count, the Record showed that the

State (1) remained willing to negotiate over the Tribe's novel request, (2) asked Pauma for specific information regarding its horse racing plans, (3) sought assistance from the Executive Director of the California Horse Racing Board during negotiations, (4) encouraged Pauma to request an off-track wagering agreement, and (5) shared with Pauma a sample on-track horse racing and wagering agreement that had been negotiated in another state. Based on this Record, the district court appropriately rejected Pauma's argument that the State failed to negotiate in good faith under IGRA over the Tribe's horse racing count.

ARGUMENT

I. STANDARD OF REVIEW

The district court granted summary judgment on the key issue of whether the State negotiated with Pauma in good faith under IGRA. "Whether the negotiations were conducted in good faith is a mixed question of law and fact that we review de novo." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir. 2010) (citing *Coyote Valley II*, 331 F.3d at 1107).

II. THE RELEVANT FACTORS FOR DETERMINING GOOD-FAITH NEGOTIATIONS UNDER IGRA

IGRA provides that any eligible Indian tribe "shall request the State . . . to enter into negotiations for the purpose of entering into a Tribal-State compact." 25 U.S.C. § 2710(d)(3)(A). The State "shall negotiate with the Indian tribe in good faith to enter into [a tribal-state] compact." *Id*. But negotiations are, of course, a two-way street. A state's ability to negotiate in good faith to reach a mutually acceptable compact assumes that a tribe shares the same goal.

While IGRA requires "good faith" negotiations, the statute does not define this important term. *In re Indian Gaming Related Cases v. State of California,* 147 F. Supp. 2d 1011, 1020 (N.D. Cal. 2001) (*Coyote Valley I*); *see* 25 U.S.C. § 2710(d)(3)(A). In making this good-faith determination, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii).

Reported IGRA cases that have analyzed a state's good faith have typically been decided on motions for summary judgment or motions to dismiss. *Wisconsin Winnebago Nation v. Thompson,* 22 F.3d 719, 723 (7th Cir. 1994) (question of bad faith negotiations under IGRA decided on cross-

motions for summary judgment); *Cheyenne River Sioux Tribe v. State of South Dakota,* 830 F. Supp. 523, 527 (D. S.D. 1993) (issue of good faith negotiation under IGRA should be decided on the basis of the transcripts of the negotiations). The reason for such treatment is that the negotiation history between states and tribes is not a subject matter that lends itself to much dispute. The proposals, counterproposals, letters, and other documents that are part of the negotiations constitute the evidence that courts will consider when determining good faith. See *Rincon*, 602 F.3d at 1041 (holding that IGRA's good faith standard is objectively evaluated by the record of negotiations.)

With regard to the 1999 Compacts, after reviewing the Record between the State and the tribes, both the district court and the Ninth Circuit rejected a tribe's numerous procedural and substantive complaints that the State failed to negotiate in good faith under IGRA. *Coyote Valley II,* 331 F.3d at 1107-17; *Coyote Valley I*, 147 F. Supp. 2d at 1021-22. In doing so, the courts identified several relevant factors to consider when determining, based on the Record, whether a state negotiated in good faith. These factors include the following:

- Did the State remain "willing to meet with the tribe for further" compact negotiations? *Coyote Valley II,* 331 F.3d

at 1110 (Ninth Circuit finding that the negotiation history showed that the State "actively negotiated with Indian tribes").

- Did the State have a duty to negotiate with the tribe to engage in the requested class III gaming? *Coyote Valley II,* 331 F.3d at 1110 (citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1255 (9th Cir. 1994)) (Ninth Circuit holding that the State remained willing to further negotiate even though it had "no obligation to negotiate with Coyote Valley over the types of class III games covered in the Davis Compact").

- Are the tribe's "challenged provisions" the result of negotiations or "unilateral demands by the State"? *Coyote Valley I*, 147 F. Supp. 2d at 1021 (district court finding that the challenged "Tribal Labor Relations Ordinance" was not a "unilateral" State demand).

- Was it the tribe, and not the State, that "declined to engage in further negotiations"? *Coyote Valley I*, 147 F. Supp. 2d at 1021-22 (district court finding that during negotiations the tribe "apparently [had] not contacted the State to arrange any further IGRA negotiations").

- Are the challenged provisions "categorically forbidden by the terms of IGRA"? *Coyote Valley II,* 331 F.3d at 1110-17 (Ninth Circuit holding that the State did not negotiate in bad

faith by refusing to enter into a compact without the Revenue Sharing Trust Fund, the Special Distribution Fund, and the Tribal Labor Relations Ordinance).

III. BASED ON THE RECORD, THE DISTRICT COURT PROPERLY HELD THAT THE STATE NEGOTIATED IN GOOD FAITH

With the above factors in mind, and based on this case's entire Record, the evidence before the district court showed that under IGRA the State responded to and negotiated with Pauma in good faith. As the district court found, the common problem in all twenty of Pauma's IGRA counts rested with the Tribe's failure to complete ongoing negotiations with the State. ER 35. In reaching this conclusion, the district court concisely categorized Pauma's twenty IGRA counts into four distinct categories, and analyzed them in the context of the undisputed Record. The Record supported summary judgment in the State's favor for each category.

A. The State Negotiated in Good Faith over the Matters Raised in the Draft Compact Counts

1. Because the State provided Pauma with individualized negotiations, summary judgment was proper on Count 11

Pauma's Count 11 attacked the State's alleged failure to provide individualized negotiations over on-track horse racing and lottery games. ER 36. Before the district court, Pauma argued that the State failed to

negotiate in good faith because it offered the Tribe a proposed compact that was similar to another recently negotiated IGRA compact. *Id.* The district court, based on a comprehensive review of the Record, rejected Pauma's Count 11. Critically important, the district court found that when the State sent Pauma a proposed compact on April 28, 2016, "the State was seeking to continue the negotiations and move them forward—not wrap them up." ER 36-37. The following key facts in the Record supported the district court's finding that the State intended to continue individualized negotiations with Pauma beyond April 28, 2016. These facts included:

- The cover email from the State on April 28, 2016 advised that the draft compact was provided for the Tribe's "consideration" and requested to know when tribal representatives "would like to discuss." ER 267.
- The State never indicated in either the cover email or the draft compact that it constituted anything other than an initial compact proposal. ER 267-403.
- The State was not trying to prevent further communications regarding lottery games because its proposed draft compact provided that the "State is open, as indicated in prior

> correspondence, to discussion regarding the authorization of additional enumerated [lottery] games." ER 282.

Based on these facts in the Record, the district court properly observed that "[n]othing prevented the Tribe from engaging in further discussions with the State on the subject of lottery games." ER 37. As such, the district court granted summary judgment in the State's favor on Count 11. *Id.* On appeal, Pauma continues to complain over the alleged lack of individualized negotiations, arguing that the State's proposed compact of April 28, 2016 was merely a "carbon copy of a compact" provided to another tribe. Opening Br. 43. According to Pauma, this proposal constituted nothing more than a "half-hearted" or "no-hearted" gesture that failed to provide individualized negotiations. *Id.* at 44.

Pauma's arguments on appeal should be rejected because they remain contrary to the Record. Consistent with IGRA's duty to negotiate in good faith, the Record showed that the State provided Pauma with individualized and ongoing government-to-governmental negotiations. Individual IGRA meetings were held on January 16, 2015, ER 119-121, September 8, 2015, SER 4-139, and December 4, 2015, ER 247-248. The State also continuously requested Pauma, both during and after these meetings, to submit to the State specific proposals. ER 127, SER 8:12-9:1, SER 10:9-18,

SER 20:18-21, SER 78:24-79:5, SER 105:4-106:4, SER 110:14-16, ER 192, ER 218-219, ER 234, ER 267, ER 282. When Pauma failed to do so, the State submitted its own draft compact to the Tribe on April 28, 2016. ER 268-403. Because this Record demonstrates individualized negotiations consistent with IGRA's duty to negotiate in good faith, this Court should affirm the district court's summary judgment in the State's favor on Count 11.

2. Because Pauma could have proposed compact modifications but failed to do so, summary judgment was proper on Counts 12 through 20

In Counts 12 through 20, Pauma criticized the State's April 28, 2016 proposal for offering draft compact terms it deemed overly harsh. As the district court summarized, the Tribe alleged in these nine counts that the State's draft compact violated IGRA because the proposal allegedly included the following requests:

- Unfavorable terms compared to those of a neighboring tribe. Count 12, ER 38.
- An updated waiver of sovereign immunity provision to limit the Tribe's ability to obtain future relief from the State. Count 13, ER 38.
- A failure to offer favorable compact terms. Count 14, ER 38.

- New revenue sharing demands while failing to offer meaningful concessions in exchange for those demands. Count 15, ER 38.
- New compact definitions to increase regulatory authority over other tribal activities. Count 16, ER 38.
- Payments into the Special Distribution Fund, while unilaterally providing the State with the ability to determine the amount of these payments. Count 17, ER 38.
- Significantly increased local regulatory costs. Count 18, ER 38.
- Provisions that would require the Tribe to make significant local revenue sharing contributions that would evade Secretarial review. Count 19, ER 39.
- Special Distribution Fund payments that could be used by the State not only to administer the compact, but also to negotiate compacts and fund the State's litigation costs. Count 20, ER 39.

In rejecting Counts 12 through 20, the district court appropriately held that the State did not violate IGRA by offering Pauma compact terms that

remained subject to further negotiations. ER 39. As the district court observed, "Nothing prevented the Tribe from seeking to negotiate or modify the terms of the draft compact." ER 42, n 4. Because Pauma's arguments on appeal ignore the State's offer for continued negotiations, they fails to show reversible error by the district court.

Under this Record, Pauma cannot persuasively minimize the State's April 28, 2016 proposal for continued compact negotiations. In forwarding this draft compact, the State expressed its desire to actively participate in substantive exchanges of specific compact language. ER 267. Indeed, the margin comment bubbles in the State's proposed draft compact showed this goal. For example, regarding lottery games, comment "A3" in the draft compact provided that the "State is open, as indicated in prior correspondence, to discussion regarding the authorization of additional enumerated games." ER 282. Regarding off-track wagering, comment "A4" provided that the "State has proposed OTW compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact." *Id.* Regarding gaming facility construction, comment "A5" provided in part that this proposal was "For Discussion. The State does not intend for the requirements of the compact currently being negotiated to be retroactive." ER 298.

This format in the State's April 28, 2016 compact proposal demonstrated that it was not a final or unilateral demand. Accordingly, unlike the negotiation posture presented in *Rincon*, the State remained flexible with Pauma and did not make a "take it or leave it" proposal in violation of IGRA. See *Rincon*, 602 F.3d at 1038-39. The Record shows that the State's proposed compact was not the "no-hearted" and inflexible demand that Pauma attempts to portray in its opening brief. As such, the district court committed no reversible error in granting summary judgement in the State's favor on Counts 12 through 20.

B. The State Negotiated in Good Faith over the Matters Raised in Pauma's Lottery Counts

1. Because the State did not engage in "surface bargaining," summary judgment was proper on Count 1

Relying on the Record, the district court rejected Pauma's claim that the State engaged in so-called "surface bargaining" regarding the Tribe's desire to operate different compacted lottery games. The district court found that in response to Pauma's lottery game requests, the State was willing discuss "the authorization of additional enumerated games." ER 50, ER 282. No doubt, these discussions took longer than expected. But the district court found that "'the record reflects that both parties at times were less than

diligent' in seeking to move the negotiations forward, particularly because of the State and Pauma's ongoing litigation concerning the 2004 Amendment." ER 50-51 (citing *Coyote Valley I*, 147 F. Supp. 2d 1015). These delays were not the result of bad-faith or "surface" bargaining by the State. Rather, similar to the Record at issue in *Coyote Valley I*, the district court found that "any delays that may have been caused by the State do not rise to the level of bad faith." ER 51-52 (citing *Coyote Valley I*, 147 F. Supp. 2d 1015, *Rincon*, 602 F.3d 1024-26).

On appeal, Pauma now attacks the district court's holding on Count 1 by arguing that it made seven separate requests for lottery games, but that the State remained "completely non-responsive" to these requests. Opening Br. 34-35. According to Pauma, when it came to lottery game negotiations, the State appeared like a "cactus or a cadaver." *Id.* at 36. However, the Record on lottery games supports neither Pauma's insults nor reversible error by the district court. To the contrary, the Record supports the district court's determination that the State remained willing to discuss lottery games with Pauma. ER 53. The following facts in the Record support this holding:

- **January 30, 2015 Letter:** In this letter, Mr. Dhillon provided the State's summary of the meeting that took place between

representatives for the State and Pauma on January 16, 2015. ER 119-121. Regarding lottery games, Mr. Dhillon wrote that during the meeting the "State asked for examples of the types of lottery games Pauma is considering." ER 120. Pauma referred to "'electronic games' and 'punchboards' as possibilities." *Id.* Mr. Dhillon "reiterated the State's need to understand the scope of games that Pauma intends to offer to help identify issues and establish a legal framework for future negotiations." ER 121.

- **May 27, 2015 Letter:** Here, Mr. Dhillon responded to a letter from Pauma's Chairman Majel. ER 127. Mr. Dhillon again stated the State's concern that Pauma was not "providing a clear description of the kinds of horse racing or lottery games it sought to conduct." *Id.*
- **September 8, 2015 Compact Meeting:** During this compact negotiation meeting Mr. Dhillon repeatedly asked Pauma's representatives for specific lottery game compact proposals. Mr. Dhillon asked Pauma's attorneys to "draft compact language on those two issues [lottery games and on-track horse racing] that you feel need to be addressed in the compact."

SER 8:12-14. Mr. Dhillon advised Pauma that if it provided such draft language, "we will look at that and we will respond." SER 8:21-22. This approach would allow the parties to work on language that "hopefully will lead to a compact." SER 8:25-9:1. Later during this meeting, Mr. Dhillon again asked Pauma's attorneys to give the State proposed lottery game language. SER 78:24-79:5. Mr. Dhillon pressed Pauma's attorneys about when they would provide this draft compact language. SER 105:4-25. When Mr. Dhillon continued to press for an answer, Pauma's attorney responded in part by saying "I don't know." SER 106:1-4.

- **November 4, 2015 Letter:** In this letter, Mr. Dhillon advised that, "[w]ith regard to lottery games, I look forward to considering Pauma's proposed compact language so we can identify and work to resolve any potential issues." ER 191. The letter concluded by saying that the State "look[s] forward to reviewing Pauma's proposals regarding a framework for final compact language addressing the new forms of gaming

that it proposes to offer—horse racing and lottery games." ER 192.

- **November 30, 2015 Letter:** Mr. Dhillon reiterated that in "regard to the lottery games, we have asked for draft compact language and received nothing but lengthy letters from you or your lawyers that seek to blame the State for the lack of progress . . . ." ER 219. Mr. Dhillon observed that such letters "fail to do anything to help the parties move forward towards the conclusion of a compact." *Id.* **December 2, 2015 Email:** In this email, Mr. Dhillon reminded Pauma's attorney that "[d]espite your many letters and e-mails, the State has yet to receive a single word of proposed compact language from the Tribe." ER 234.

Pauma's appeal cannot persuasively ignore these undisputed facts in the Record. This Record shows that far from engaging in surface bargaining, the State pushed Pauma to make specific lottery game compact proposals. Contrary to the selective and subjective approach taken by Pauma in presenting the Record in this appeal, the district court based its holding on a detailed review of the entire history of lottery game negotiations under *Rincon's* objective inquiry standard. *Rincon*, 602 F.3d at

1041. Under this standard, the district court properly rejected Count 1 because the State repeatedly asked Pauma to propose specific lottery game compact language, and the Tribe consistently failed to comply. As a result, the district court committed no reversible error in granting summary judgment in the State's favor on Pauma's Count 1. *See Coyote Valley II*, 331 F.3d at 1110 (State not found in bad faith under IGRA when the record of negotiations established that it "actively negotiated with Indian tribes").

2. Because the State did not engage in protectionist or anti-competitive strategies to protect the California State Lottery, summary judgment was proper on Count 2

Before the district court, Pauma argued in Count 2 that the State failed to negotiate in good faith under IGRA because the State's representatives engaged in a protectionist strategy to protect the California State Lottery's revenues. The district court correctly rejected Pauma's protectionist strategy count. In granting summary judgment in the State's favor, the district court noted the State's willingness to negotiate for additional lottery games. ER 52. As the district court observed, "If agreeing to negotiate to allow Pauma to offer new games beyond that conducted by the California State Lottery is part of the State's protectionist strategy, it is a poor one." ER 52-53.

On appeal, Pauma disputes the district court's lottery games holdings by claiming that the Record "insinuated" the State's desire to protect the California State Lottery from tribal competition. Opening Br. 42. However, Pauma bases its argument exclusively on two pages of the transcript from a single compact negotiation meeting on September 8, 2015. *Id.* at 43. A portion of this meeting's recorded transcript includes a brief exchange, initiated by Pauma's counsel, regarding the California State Lottery's generated revenue for educational programs. SER 55. During this exchange Pauma's counsel stated "I'm just going based on the clear language of the section. That's all. We just want the rights to do lottery games. And I know this is a sensitive area for the State since the lottery makes like $5 billion per year." SER 55:11-15. After the State's representative responded that all children benefit from these education funds, Pauma's counsel then suggested a protectionist motivation by saying "I get it. But you - - I don't know if protectionism is, like, a valid concern under IGRA, though. You know, there is a way to provide tribes with equal rights." SER 56:3-6. Counsel for Pauma and the State then discussed whether IGRA permits the State to negotiate over terms to protect its own gaming industry. SER 56:7-15.

This Court should reject Pauma's ongoing bad faith arguments on appeal for Count 2 because they remain in direct conflict with the Record. As previously discussed, the State offered to negotiate over new lottery games, and repeatedly asked Pauma to propose specific games that could be enumerated in a compact. The State also offered the Tribe a draft compact that could include newly enumerated lottery games. ER 282. Instead of responding with new lottery games proposals, Pauma abandoned further negotiations and initiated litigation. The Record simply does not show the actions of a state government trying to avoid tribal competition with its own lottery. To the contrary, it documents that the State tried to engage Pauma in further lottery game negotiations, but the Tribe refused.

Moreover, the Record for the September 8, 2015 negotiation session does not support Pauma's claim that the State "insinuated" a protectionist strategy. Far from discouraging Pauma against proposing new lottery games, during this meeting Mr. Dhillon asked Pauma's attorneys to send him proposed lottery game language. SER 78:24-79:5. Mr. Dhillon even pressed Pauma's attorneys about when they would provide him with this draft lottery game compact language. SER 105:4-106:4. Because the Record shows that the State was not attempting to block new tribal lottery games from competing with the California State Lottery, the district court

did not commit reversible error in granting summary judgment for the State in Count 2.

3. Because the State remained willing to negotiate for new lottery games, summary judgment was proper on Counts 4 through 8

Before the district court, Pauma argued in Counts 4 through 8 that the State failed to negotiate over lottery games in good faith under IGRA. Specifically, Pauma complained that the State would not negotiate for video lottery terminals. ER 47. The State also failed, according to Pauma, to negotiate for video lottery games that dispensed coins or currency, a tribal lottery system, and for lottery games authorized to the Multi-State Lottery Association or any other state lottery. ER 47-48.

In all of these lottery game counts, the district court agreed with the State's position that the Record documented the State's willingness to continue negotiations. ER 48. In particular, the district court pointed to the State's letter on March 30, 2016 that explained its lottery game position. ER 49, 262-263. Namely, while the State expressed its concerns about negotiating over lottery games beyond those authorized for the California

State Lottery,[5] the State nonetheless remained "willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact." ER 262. Further, when the State offered a draft compact to Pauma several weeks later, the district court found that "the State remained willing to continue negotiating with Pauma on this issue." ER 49. Based on this Record, the district court correctly held that under *Rincon* the parties never reached impasse in their lottery games negotiations, and that under *Coyote Valley II* the State remained willing to negotiate further with the Tribe. ER 49.

On appeal, Pauma attacks the district court's rejection of its lottery game counts by arguing that the district court impermissibly created a new "impasse" IGRA defense. Opening Br. 44-50. But Pauma's arguments should be rejected because they mischaracterize both the Record and the district court's analysis. The Record does not show that the parties were at a standoff regarding Pauma's desire to operate specific lottery games beyond those offered by the California State Lottery. To the contrary, the Record

[5] California statutory limitations on the types of lottery games that the California State Lottery can operate include the limits set forth in California Government Code section 8880.28. The limitations in that statute include prohibitions on lottery games that include designated gambling themes, and computer terminals that dispense coins or currency. See Cal. Gov't Code § 8880.28(a)(1) & (3).

shows the State's willingness to consider specific tribal lottery games, and the Tribe's refusal to offer concrete proposals. Far from impasse, Pauma simply abandoned ongoing negotiations without proposing the details for any enumerated lottery game.

As the district court noted (ER 49), Mr. Dhillon's March 30, 2016 letter advised Pauma as follows:

> The grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized for play by the California State Lottery. This was the intent and understanding of the language proposed by tribal negotiators and presented to the voters as they considered the amendment to the California Constitution. *However, the State is willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact.*

ER 49, 262 (emphasis added).

Mr. Dhillon's letter showed that the State was willing to consider new lottery games beyond those authorized to the California State Lottery, but the State remained legitimately opposed to Pauma's preference for broadly defining the scope of authorized tribal lottery games. The March 30, 2016 letter explained the State's good-faith concern to Pauma. The Tribe's approach would not provide the required "clarity as to the scope of the authorization" for new lottery games. ER 262. Pauma's approach would

also lead to "future disputes between the parties" regarding the scope of approved lottery games. *Id.* Finally, Pauma's approach would create the risk of inadvertently authorizing games that violated "other prohibitions on how lottery games may be conducted" under California law. *Id*.

This good-faith requirement by the State for specificity was necessary to avoid inadvertently authorizing unlawful lottery games through IGRA negotiations. In support of this concern, the March 30, 2016 letter cited *Western Telcon, Inc. v. California State Lottery*, 13 Cal. 4th 475. *Western Telcon* involved a game operated by the State Lottery known as "CSL Keno." While the California State Lottery considered CSL Keno to be an authorized "lottery game," the California Supreme Court disagreed and held that it was an illegal and unauthorized "banking game" under the California Constitution. *Id.* at 488-89. *Western Telcon* shows how the scope of permitted lottery games under California law is not always clear.

Understandably, the State wanted to avoid repeating *Western Telcon's* scenario of uncertainty over the legality of so-called lottery games. With this concern in mind, Mr. Dhillon's March 30, 2016 letter concluded that, while the State was not conceding that it was required to negotiate for all the games that Pauma broadly labeled as "lottery games," it was willing to engage in further lottery negotiations. ER 262. The State maintained this

approach when it submitted a proposed draft compact to Pauma. ER 267. Based on this Record, the State's efforts to negotiate for new lottery games constituted neither an outright refusal to negotiate for lottery games beyond those authorized to the California State Lottery, nor bad faith under IGRA. As a result, the district court properly granted summary judgment in the State's favor regarding Pauma's lottery games.

4. Because the State adequately substantiated its lottery game position, summary judgment was proper on Count 9

Before the district court, Pauma argued in Count 9 that the State also failed, regarding lottery games, to substantiate its position on the lottery games with supporting evidence. ER 53. While the Tribe continues to push this argument on appeal, Opening Brief 41-42, the district court's summary judgment in the State's favor on Count 9 should be affirmed for two reasons.

First, Pauma offers no legal authority under IGRA that a state's failure to substantiate a bargaining position constitutes bad faith, and the Record fails to support such a claim. Significantly, the Record does not show a failure by the parties to conclude a compact on lottery games due to the State's failure to substantiate its bargaining positions. Instead, the Record shows that the State repeatedly asked for—but Pauma continually failed to provide—compact language for specific lottery games that could be included

in the compact. Further, the failure to reach an agreement on lottery games was due to Pauma's refusal to engage in negotiations with the State, including the Tribe's failure to counter the State's April 28, 2016 draft compact proposal. ER 267.

Second, the State did substantiate its position on new lottery games in the Record. As previously discussed, after receiving Pauma's very broad legal framework for proposed lottery games in a letter dated January 27, 2016, ER 255-57, Mr. Dhillon responded on March 30, 2016, advising the Tribe why this approach was not acceptable. ER 262-63. This letter substantiated both the legal and policy reasons behind the State's need for more specificity regarding Pauma's stated desire for new lottery games. *Id.* The State then followed up with a proposed draft compact for the Tribe's consideration and counterproposals. ER 267-403. Because IGRA's good-faith negotiation standard does not require a state to substantiate its bargaining position, and in any event the State did substantiate its position on lottery games, the district court's summary judgment in the State's favor for Count 9 should be affirmed.

C. The State Negotiated in Good Faith over the Matters Raised in Pauma's Scope of IGRA Negotiations Count

Pauma's Count 10 focused on another alleged procedural barrier that supposedly hampered IGRA negotiations between the parties. As explained by the district court, this count fixated on a resolved dispute over the scope of compact negotiations. At first, Pauma requested negotiations under section 12.2 of its existing compact, which permitted renegotiations for new forms of class III gaming. ER 94-95. The State quickly agreed to the Tribe's request. ER 99-100. Pauma later sought to expand the scope of negotiations, ER 183-84, and the State initially objected. ER 191. However, the parties resolved this matter when the State agreed to the Tribe's request and clarified that "both parties are amenable to considering all aspects of the existing compact and other appropriate provisions" of the compact. ER 247. The State again confirmed in writing a few weeks later that, pursuant to the Tribe's request, the entire compact was subject to negotiation. ER 253.

Despite the resolution of the scope-of-negotiations dispute, Pauma shifted gears and expressed a new desire to "conduct the negotiations in a piecemeal fashion, focusing on the material issue and then moving on to the next only after the parties have largely agreed on language for the final compact." ER 255. The State declined Pauma's "piecemeal" approach, ER 262, and instead provided Pauma with a draft compact to guide further negotiations. ER 267-403.

Against this backdrop, Pauma's Count 10 before the district court argued that the State impermissibly created a procedural barrier to "shift the discussion from what the State would *give* to what it would *receive*." ER 54. The district court properly rejected Count 10 under the Record, holding that the "parties resolved this dispute and pressed onwards—with Pauma then seeking to focus on a single issue, and the State seeking to negotiate the entire compact." ER 55. During this dispute, "the State continued to engage Pauma on the lottery games and horse wagering issues." *Id.* Accordingly, citing to *Coyote Valley I*, the district court held that under this Record "[a]ny delays that may have been caused by the State do not rise to the level of bad faith." *Id.*

Pauma's appeal attempts to dispute the district court's analysis by arguing that the scope-of-negotiations dispute allowed the State "to totally *renegotiate* the 1999 Compact without having to discuss the new gaming rights that precipitated the talks." Opening Br. 38. But the Record does not support Pauma's assertion that the State used this dispute to refuse further lottery game negotiations. To the contrary, the Record documents that following this dispute, the State documented its willingness to negotiate over new lottery games beyond those offered by the California State Lottery. ER 262-263. Further, the State's proposed draft compact again offered Pauma

the opportunity to provide enumerated lottery game proposals. ER 282. In both instances, the Tribe refused to do so. Accordingly, based on this Record, the district court did not commit reversible error in finding in the State's favor on Count 10.

D. The State Negotiated in Good Faith over the Matters Raised in Pauma's On-Track Horse Racing and Wagering Count

In Count 3, Pauma alleged before the district court that the State failed to negotiate in good faith regarding on-track horse racing and wagering. ER 43-44. Based on the Record, the district court rejected this IGRA count, and found that Count 3 failed "to demonstrate a lack of good faith on this basis." ER 44. As follows, the Record supports the district court's holding:

- Even though Pauma's request for a tribal on-track horse racing was novel, the State told the Tribe it would negotiate over this topic. ER 99.
- The State requested additional information from Pauma about the on-track horse racing proposal, ER 121, and provided for the Executive Director of the California Horse Racing Board to be available at a meeting to answer questions about tracks in California. SER 11:1-25, SER 25:3-26:13, 31:2-32:12, 33:5-35:23.

- The State also encouraged Pauma to include "off-track wagering" as part of the horse racing plan. ER 219.
- The State "reached out to the National Indian Gaming Commission to obtain information regarding other tribes that may be conducting wagering for on-track horse racing." ER 191.
- The State found and shared with Pauma, for further compact discussions, a "Compact Addendum between the Sisseton-Wahpeton Sioux Tribe and the State of North Dakota addressing pari-mutuel horse racing." ER 193-213.
- The State's draft compact proposed the inclusion of an "OTW compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact." ER 282.

Based on this Record, the district court stated that it was not "persuaded by Pauma's attempts to argue the State acted in bad faith." Citing to *Coyote Valley II*, the district court held that it "'cannot conclude from the history of negotiations recounted above that . . . the State has refused to negotiate in good faith' on this basis." ER 44. In response, Pauma's appellate brief fails to raise any specific challenges to the district court's analysis regarding the on-track horse racing and wagering count. As

a result, this Court should affirm the district court's grant of summary judgment on Count 3 in the State's favor.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the district court's order granting summary judgment to the State and denying summary judgment to Pauma.

Dated: November 1, 2019

Respectfully submitted,

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18-56457

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA; and EDMUND G. BROWN, JR., as Governor of the State of California; DOES 1 THROUGH 10,

Defendants and Appellees.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned submits and concurs with counsel for Pauma that the only case that is potentially related to this matter is *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155 (9th Cir. 2015) (Nos. 14-56104 & 14-56105).

Dated: November 1, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

SUBCHAPTER III—SPECIAL PROGRAMS RELATING TO ADULT EDUCATION FOR INDIANS

§ 2631. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section, Pub. L. 100–297, title V, § 5330, Apr. 28, 1988, 102 Stat. 410, related to improvement of educational opportunities for adult Indians. See section 7851 of Title 20, Education.

SUBCHAPTER IV—PROGRAM ADMINISTRATION

§§ 2641 to 2643. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section 2641, Pub. L. 100–297, title V, § 5341, Apr. 28, 1988, 102 Stat. 411; Pub. L. 100–427, § 21, Sept. 9, 1988, 102 Stat. 1612, related to establishment of Office of Indian Education within Department of Education. See section 3423c of Title 20, Education.

Section 2642, Pub. L. 100–297, title V, § 5342, Apr. 28, 1988, 102 Stat. 412; Pub. L. 100–427, § 22, Sept. 9, 1988, 102 Stat. 1613, established National Advisory Council on Indian Education.

Section 2643, Pub. L. 100–297, title V, § 5343, Apr. 28, 1988, 102 Stat. 413, authorized appropriations for administration of Indian education programs. See section 7882 of Title 20, Education.

SUBCHAPTER V—MISCELLANEOUS

§ 2651. Repealed. Pub. L. 103–382, title III, § 367, Oct. 20, 1994, 108 Stat. 3976

Section, Pub. L. 100–297, title V, § 5351, Apr. 28, 1988, 102 Stat. 413; Pub. L. 100–427, § 23, Sept. 9, 1988, 102 Stat. 1613, defined terms for purposes of this chapter. See section 7881 of Title 20, Education.

CHAPTER 29—INDIAN GAMING REGULATION

Sec.

§ 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

(Pub. L. 100–497, § 2, Oct. 17, 1988, 102 Stat. 2467.)

SHORT TITLE

Pub. L. 100–497, § 1, Oct. 17, 1988, 102 Stat. 2467, provided: ''That this Act [enacting this chapter and sections 1166 to 1168 of Title 18, Crimes and Criminal Procedure] may be cited as the 'Indian Gaming Regulatory Act'.''

§ 2702. Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

(Pub. L. 100–497, § 3, Oct. 17, 1988, 102 Stat. 2467.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2703. Definitions

For purposes of this chapter—

(1) The term ''Attorney General'' means the Attorney General of the United States.

(2) The term ''Chairman'' means the Chairman of the National Indian Gaming Commission.

(3) The term ''Commission'' means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term ''Indian lands'' means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term ''Indian tribe'' means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term ''class I gaming'' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term ''class II gaming'' means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term ''class II gaming'' does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term ''class II gaming'' includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term ''class III gaming'' means all forms of gaming that are not class I gaming or class II gaming.

(9) The term ''net revenues'' means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term ''Secretary'' means the Secretary of the Interior.

(Pub. L. 100–497, §4, Oct. 17, 1988, 102 Stat. 2467; Pub. L. 102–238, §2(a), Dec. 17, 1991, 105 Stat. 1908; Pub. L. 102–497, §16, Oct. 24, 1992, 106 Stat. 3261.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

AMENDMENTS

1992—Par. (7)(E). Pub. L. 102–497 struck out ''or Montana'' after ''Wisconsin''.

1991—Par. (7)(E), (F). Pub. L. 102–238 added subpars. (E) and (F).

CLASS II GAMING WITH RESPECT TO INDIAN TRIBES IN WISCONSIN OR MONTANA ENGAGED IN NEGOTIATING TRIBAL-STATE COMPACTS

Pub. L. 101–301, §6, May 24, 1990, 104 Stat. 209, provided that: ''Notwithstanding any other provision of law, the

term 'class II gaming' includes, for purposes of applying Public Law 100–497 [25 U.S.C. 2701 et seq.] with respect to any Indian tribe located in the State of Wisconsin or the State of Montana, during the 1-year period beginning on the date of enactment of this Act [May 24, 1990], any gaming described in section 4(7)(B)(ii) of Public Law 100–497 [25 U.S.C. 2703(7)(B)(ii)] that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated made a request, by no later than November 16, 1988, to the State in which such gaming is operated to negotiate a Tribal-State compact under section 11(d)(3) of Public Law 100–497 [25 U.S.C. 2710(d)(3)].''

TRIBAL-STATE COMPACT COVERING INDIAN TRIBES IN MINNESOTA; OPERATION OF CLASS II GAMES; ALLOWANCE OF ADDITIONAL YEAR FOR NEGOTIATIONS

Pub. L. 101–121, title I, § 118, Oct. 23, 1989, 103 Stat. 722, provided that: ''Notwithstanding any other provision of law, the term 'Class II gaming' in Public Law 100–497 [25 U.S.C. 2701 et seq.], for any Indian tribe located in the State of Minnesota, includes, during the period commencing on the date of enactment of this Act [Oct. 23, 1989] and continuing for 365 days from that date, any gaming described in section 4(7)(B)(ii) of Public Law 100–497 [25 U.S.C. 2703(7)(B)(ii)] that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdication [sic] over the lands on which such gaming was operated, requested the State of Minnesota, no later than 30 days after the date of enactment of Public Law 100–497 [Oct. 17, 1988], to negotiate a tribal-state compact pursuant to section 11(d)(3) of Public Law 100–497 [25 U.S.C. 2710(d)(3)].''

§ 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5.

(3) All members of the Commission shall be reimbursed in accordance with title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

(Pub. L. 100–497, § 5, Oct. 17, 1988, 102 Stat. 2469.)

§ 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;

(2) levy and collect civil fines as provided in section 2713(a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

(Pub. L. 100–497, § 6, Oct. 17, 1988, 102 Stat. 2470.)

§ 2706. Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Omitted

(d) Application of Government Performance and Results Act

(1) In general

In carrying out any action under this chapter, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103–62; 107 Stat. 285).

(2) Plans

In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103–62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

(Pub. L. 100–497, § 7, Oct. 17, 1988, 102 Stat. 2470; Pub. L. 109–221, title III, § 301(a), May 12, 2006, 120 Stat. 341.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b)(4), (10) and (d)(1), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

The Government Performance and Results Act of 1993, referred to in subsec. (d), is Pub. L. 103–62, Aug. 3, 1993, 107 Stat. 285, which enacted section 306 of Title 5, Government Organization and Employees, sections 1115 to 1119, 9703, and 9704 of Title 31, Money and Finance, and sections 2801 to 2805 of Title 39, Postal Service, amended section 1105 of Title 31, and enacted provisions set out as notes under sections 1101 and 1115 of Title 31. For complete classification of this Act to the Code, see Short Title of 1993 Amendment note set out under section 1101 of Title 31 and Tables.

CODIFICATION

Subsec. (c) of this section, which required the Commission to submit a report to Congress every two years on various matters relating to the operation of the Commission, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 114 of House Document No. 103-7.

AMENDMENTS

2006—Subsec. (d). Pub. L. 109–221 added subsec. (d).

§ 2707. Commission staffing

(a) General Counsel

The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS–18 of the General Schedule under section 5332 of title 5.

(b) Staff

The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5 governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so ap-

pointed may receive pay in excess of the annual rate of basic pay payable for GS–17 of the General Schedule under section 5332 of that title.

(c) Temporary services

The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS–18 of the General Schedule.

(d) Federal agency personnel

Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this chapter, unless otherwise prohibited by law.

(e) Administrative support services

The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

(Pub. L. 100–497, § 8, Oct. 17, 1988, 102 Stat. 2471.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (d), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

§ 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this chapter. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

(Pub. L. 100–497, § 9, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

(Pub. L. 100–497, § 10, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of

$25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section[1]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

[1] So in original. Probably should be followed by a comma.

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only

when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe[2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

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[2] So in original. Probably should not be capitalized.

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub. L. 100–497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a), (d)(7)(B)(iv), (vii)(I), (8)(B)(i), (C), and (e), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of section 11 of Pub. L. 100–497, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied

that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

(Pub. L. 100–497, § 12, Oct. 17, 1988, 102 Stat. 2479.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(3), (e)(1)(C), (3), (g), and (h), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2712. Review of existing ordinances and contracts

(a) Notification to submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant

to subsection (a) of this section, the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or modification of management contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a) of this section, the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a) of this section, and the management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a) of this section, or the management contractor under a contract submitted under subsection (a) of this section, does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

(Pub. L. 100–497, § 13, Oct. 17, 1988, 102 Stat. 2481.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

(Pub. L. 100–497, § 14, Oct. 17, 1988, 102 Stat. 2482.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1), (3), (b)(1), and (d), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5.

(Pub. L. 100–497, § 15, Oct. 17, 1988, 102 Stat. 2483.)

§ 2715. Subpoena and deposition authority

(a) Attendance, testimony, production of papers, etc.

By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Geographical location

The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Refusal of subpoena; court order; contempt

Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Depositions; notice

A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Oath or affirmation required

Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witness fees

Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Pub. L. 100–497, § 16, Oct. 17, 1988, 102 Stat. 2483.)

§ 2716. Investigative powers

(a) Confidential information

Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) Attorney General

The Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of Federal law.

(Pub. L. 100–497, § 17, Oct. 17, 1988, 102 Stat. 2484.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (c), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2717. Commission funding

(a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each gaming operation that conducts a class II or class III gaming activity that is regulated by this chapter.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

(i) no more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this chapter.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed 0.080 percent of the gross gaming revenues of all gaming operations subject to regulation under this chapter.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall,

subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this chapter for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718 of this title, in an amount equal the amount of funds derived from assessments authorized by subsection (a) of this section for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

(Pub. L. 100–497, § 18, Oct. 17, 1988, 102 Stat. 2484; Pub. L. 105–83, title I, § 123(a)(1)–(2)(B), Nov. 14, 1997, 111 Stat. 1566; Pub. L. 109–221, title III, § 301(b), May 12, 2006, 120 Stat. 341.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(1), (2), (4), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

AMENDMENTS

2006—Subsec. (a)(2)(B). Pub. L. 109–221 added subpar. (B) and struck out former subpar. (B) which read as follows: ''The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $8,000,000.''

1997—Subsec. (a)(1). Pub. L. 105–83, § 123(a)(1), substituted ''gaming operation that conducts a class II or class III gaming activity'' for ''class II gaming activity''.

Subsec. (a)(2)(A)(i). Pub. L. 105–83, § 123(a)(2)(A), substituted ''no more than 2.5 percent'' for ''no less than 0.5 percent nor more than 2.5 percent''.

Subsec. (a)(2)(B). Pub. L. 105–83, § 123(a)(2)(B), substituted ''$8,000,000'' for ''$1,500,000''.

APPLICATION TO SELF-REGULATED TRIBES

Pub. L. 105–83, title I, § 123(a)(2)(C), Nov. 14, 1997, 111 Stat. 1566, as amended by Pub. L. 105–277, div. A, § 101(e) [title III, § 338], Oct. 21, 1998, 112 Stat. 2681–231, 2681–295, provided that: ''[N]othing in subsection (a) of this section [amending this section] shall apply to the Mississippi Band of Choctaw.''

§ 2717a. Availability of class II gaming activity fees to carry out duties of Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 2717 of this title shall be available to carry out the duties of the Commission, to remain available until expended.

(Pub. L. 101–121, title I, Oct. 23, 1989, 103 Stat. 718.)

CODIFICATION

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1990, and not as part of the Indian Gaming Regulatory Act which comprises this chapter.

§ 2718. Authorization of appropriations

(a) Subject to section 2717 of this title, there are authorized to be appropriated, for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title.

(b) Notwithstanding section 2717 of this title, there are authorized to be appropriated to fund the operation of the Commission, $2,000,000 for fiscal year 1998, and $2,000,000 for each fiscal year thereafter. The amounts authorized to be appropriated in the preceding sentence shall be in addition to the amounts authorized to be appropriated under subsection (a) of this section.

(Pub. L. 100–497, § 19, Oct. 17, 1988, 102 Stat. 2485; Pub. L. 102–238, § 2(b), Dec. 17, 1991, 105 Stat. 1908; Pub. L. 105–83, title I, § 123(b), Nov. 14, 1997, 111 Stat. 1566; Pub. L. 105–119, title VI, § 627, Nov. 26, 1997, 111 Stat. 2522.)

AMENDMENTS

1997—Subsec. (a). Pub. L. 105–119 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''Subject to the provisions of section 2717 of this title, there are hereby authorized to be appropriated for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title for the fiscal year immediately preceding the fiscal year involved, for the operation of the Commission.''

Pub. L. 105–83, § 123(b)(1), substituted ''for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 2717(a) of this title for the fiscal year immediately preceding the fiscal year involved,'' for ''such sums as may be necessary''.

Subsec. (b). Pub. L. 105–83, § 123(b)(2), added subsec. (b) and struck out former subsec. (b) which read as follows: ''Notwithstanding the provisions of section 2717 of this title, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989. Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.''

1991—Subsec. (b). Pub. L. 102–238 inserted at end ''Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.''

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

(Pub. L. 100–497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (d)(1), was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2720. Dissemination of information

Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.

(Pub. L. 100–497, § 21, Oct. 17, 1988, 102 Stat. 2486.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

§ 2721. Severability

In the event that any section or provision of this chapter, or amendment made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect.

(Pub. L. 100–497, § 22, Oct. 17, 1988, 102 Stat. 2486.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, known as the Indian Gaming Regulatory Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

CHAPTER 30—INDIAN LAW ENFORCEMENT REFORM

§ 2801. Definitions

For purposes of this chapter—

(1) The term ''Branch of Criminal Investigations'' means the entity the Secretary is required to establish within the Office of Justice Services under section 2802(d)(1) of this title.

(2) The term ''Bureau'' means the Bureau of Indian Affairs of the Department of the Interior.

(3) The term ''employee of the Bureau'' includes an officer of the Bureau.

(4) The term ''enforcement of a law'' includes the prevention, detection, and investigation of an offense and the detention or confinement of an offender.

(5) The term ''Indian country'' has the meaning given that term in section 1151 of title 18.

(6) The term ''Indian tribe'' has the meaning given that term in section 1301 of this title.

(7) The term ''offense'' means an offense against the United States and includes a violation of a Federal regulation relating to part or all of Indian country.

(8) The term ''Secretary'' means the Secretary of the Interior.

(10)[1] The term ''tribal justice official'' means—

(A) a tribal prosecutor;

(B) a tribal law enforcement officer; or

(C) any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court.

(Pub. L. 101–379, § 2, Aug. 18, 1990, 104 Stat. 473; Pub. L. 111–211, title II, §§ 203(b), 211(a), July 29, 2010, 124 Stat. 2263, 2264.)

AMENDMENTS

2010—Pub. L. 111–211, § 211(a), redesignated and reordered pars. (9) and (1) to (7) as (1) to (8), respectively, substituted ''Office of Justice Services'' for ''Division of Law Enforcement Services'' in par. (1), and struck out former par. (8) which read as follows: ''The term 'Division of Law Enforcement Services' means the entity established within the Bureau under section 2802(b) of this title.''

Par. (10). Pub. L. 111–211, § 203(b), added par. (10).

SHORT TITLE OF 2010 AMENDMENT

Pub. L. 111–211, title II, § 201(a), July 29, 2010, 124 Stat. 2261, provided that: ''This title [enacting part G (§ 458ccc et seq.) of subchapter II of chapter 14 of this title and sections 2810 to 2815, 3665a, and 3682 of this title, redesignating part F (§ 458bbb et seq.) of subchapter II of chapter 14 of this title as part H (§ 458ddd et seq.), amending this section and sections 458ddd–1, 458ddd–2, 1302, 1321, 2411 to 2413, 2414a, 2415, 2431 to 2433, 2441, 2442, 2451, 2453, 2802 to 2804, 2809, 3613, 3621, 3653, 3662, 3663, 3666, and 3681 of this title, sections 841, 845, 1162, 4042, and 4352 of Title 18, Crimes and Criminal Procedure, sections 872, 872a, 873, and 878 of Title 21, Food and Drugs, sections 534 and 543 of Title 28, Judiciary and Judicial Procedure, and sections 2996f, 3732, 3796h, 3796dd, 5616, 5783, and 13709 of Title 42, The Public Health and Welfare, enacting provisions set out as notes under this section and section 1302 of this title, section 872 of Title 21, section 534 of Title 28, and sections 3732, 3796h, 3796dd, and 14044 of Title 42, amending provisions set out as a note under section 534 of Title 28, and repealing provisions set out as a note under section 3651 of this title] may be cited as the 'Tribal Law and Order Act of 2010'.''

SHORT TITLE

Pub. L. 101–379, § 1, Aug. 18, 1990, 104 Stat. 473, provided that: ''This Act [enacting this chapter and provisions set out as a note under section 2991a of Title 42, The Public Health and Welfare] may be cited as the 'Indian Law Enforcement Reform Act'.''

SEVERABILITY

Pub. L. 111–211, title II, § 204, July 29, 2010, 124 Stat. 2263, provided that: ''If any provision of this title [see Short Title of 2010 Amendment note above], an amendment made by this title, or the application of such a provision or amendment to any individual, entity, or circumstance, is determined by a court of competent jurisdiction to be invalid, the remaining provisions of this title, the remaining amendments made by this title, and the application of those provisions and amendments to individuals, entities, or circumstances other than the affected individual, entity, or circumstance shall not be affected.''

FINDINGS; PURPOSES

Pub. L. 111–211, title II, § 202, July 29, 2010, 124 Stat. 2262, provided that:

''(a) FINDINGS.—Congress finds that—

''(1) the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country;

''(2) Congress and the President have acknowledged that—

''(A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and

''(B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country;

''(3) less than 3,000 tribal and Federal law enforcement officers patrol more than 56,000,000 acres of Indian country, which reflects less than ½ of the law enforcement presence in comparable rural communities nationwide;

''(4) the complicated jurisdictional scheme that exists in Indian country—

''(A) has a significant negative impact on the ability to provide public safety to Indian communities;

''(B) has been increasingly exploited by criminals; and

[1] So in original. There is no par. (9).

CERTIFICATE OF SERVICE

Case Name: **Pauma Band v. State/Edmund Brown (Bad Faith 2016) (Appeal)** Case No. **18-56457**

I hereby certify that on November 1, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEES' ANSWERING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 1, 2019, at Sacramento, California.

TIMOTHY M. MUSCAT	*/s/ Timothy M. Muscat*
Declarant	Signature

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